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Menteri Dalam Negeri & Anor v Chong Ton Sin (t/a Gerakbudaya Enterprise) & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-156–03 OF 2022
AZIZAH NAWAWI, GUNALAN MUNIANDY AND WONG KIAN KHEONG JJCA
6 DECEMBER 2023

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Constitutional Law — Fundamental liberties — Freedom of speech and expression — Home Minister banned book touching on homosexuality because it was likely to prejudice morality, public order and public interest — Whether any reasonable person in Home Minister's position and apprised of all relevant facts and circumstances would have been satisfied that the book was likely to prejudice morality, public order and public interest — Whether High Court rightly allowed judicial review application of author and publisher/distributor of the book ('respondents') to quash Home Minister's decision to ban the book — Whether fact that respondents were not given an opportunity to be heard before the book was banned was a valid ground for quashing the ban order — Printing Presses and Publications Act 1984 s 7(1)

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The first respondent ('R1') had in September 2013 published and distributed a book entitled 'Gay is OK! A Christian Perspective' ('the book') authored by the second respondent. In November 2020, the first appellant ('A1') issued an order under s 7(1) of the Printing Presses and Publications Act 1984 ('the PPPA') banning the printing, importation, production, reproduction, publication, sale, issue, circulation, distribution and possession of the book on the ground that it contained matters which were likely to prejudice public order, morality and public interest. In quashing A1's ban order after hearing a judicial review application filed by the respondents, the High Court ('HC') found, inter alia, that: (a) the book had not caused any untoward incident during the seven years since it was first published; (b) there was no evidence of how many; copies of the book had been printed, published or circulated before the ban order came into force (c) A1 had only considered the views of a limited group of persons of a particular religion who were opposed to the book and had not considered the views of the Malaysian society as a whole towards the book; (d) A1 had, without evidential basis, concluded that homosexuality was not only unacceptable to Malaysians but that it was an 'offence' under all the religions practised in the country (in this regard, A1 had not adduced any expert evidence to rebut an expert opinion on the book produced by the respondents); (e) there was no evidential basis to justify the ban; (f) A1 had focused on only certain 'excerpts' from the book and had taken them out of

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context; (g) the respondents were never given an opportunity to be heard before the decision to ban the book was made; (h) A1's decision did not accord with human rights principles contained in the Universal Declaration of Human Rights ('UDHR') read with s 4(4) of the Human Rights Commission of Malaysia Act 1999 ('the HRCMA'); and (i) in coming to its decision, the court could rely upon Indian cases on freedom of speech based on art 19(2) of the Constitution of India. The instant appeal was against the HC's decision.

Held, by majority, allowing the appeal and setting aside the HC's decision:

(1) **(per Gunalan Muniandy JCA, dissenting)** The High Court judge correctly took into account the following material facts in allowing the respondents' judicial review application: that the book had been in publication for seven years since September 2013, that from September 2010 until April 2011, the book was published widely in the Malaysiakini online news portal, that there was no evidence of any reports made by any party that the book had posed a threat to public order, morality or public interest, that there was no evidence of any negative public response to the issue of homosexuality raised in the book (the incidents referred to by A1 relating to public response to the culture of homosexualty had no connection to the book nor did those incidents disrupt public safety and tranquility), there was no evidence as to how many copies of the book had been printed or published and how widely it had been circulated to pose a threat to public order (see para 15).

(2) **(per Gunalan Muniandy JCA, dissenting)** Based on the grounds stated in the aforesaid paragraph, the High Court judge found that A1 had failed to justify the ban on the book. If there was no evidence that the book had actually prejudiced public order during the seven years of its publication, it followed that it was unlikely to be so prejudicial. In addition, the judge below correctly remarked that A1 had failed to produce any evidence that the views of the different religious bodies and diverse cultural segments of our society had been taken into consideration. The matters referred to by A1 in his affidavit in reply represented the views of a limited group of persons of a particular religion which in no way represented the views of the Malaysian society as a whole. The court below correctly held that A1 had taken into account irrelevant considerations, that he had failed to assess the book objectively and that he had failed to show any evidence that the book was likely to be prejudicial to public order, morality and public interest (see paras 16–17).

(3) **(per Gunalan Muniandy JCA, dissenting)** In finding that A1 had not properly and objectively read and examined the contents of the book, the judge below found that A1 had dissected significant excerpts from the book said to be likely to be prejudicial to public order, morality and

public interest. This approach did not represent the actual meaning of the impugned passages and paragraphs concerned as A1 had omitted to refer to the texts that gave context to the impugned passages and paragraphs (see para 21).

(4) **(per Gunalan Muniandy JCA, dissenting)** The judge below had judicially appreciated and analysed all the facts and circumstances of the case and had adequately evaluated the evidence in deciding to allow the judicial review application. She had not erred in principle or fact in doing so (see paras 22–23).

(5) **(per Wong Kian Kheong JCA, majority)** Under s 7(1) of the PPPA, the Minister could exercise his discretionary power regarding a publication not only if it contained anything which was actually prejudicial to public order, morality, security, public interest or national interest but also if it was likely to do so or if the publication was likely to alarm the public or was contrary to any law or likely to be contrary to any law. The purpose of the seven 'likely' limbs was to confer on the Minister a preventive power to ban any publication which had the potential to cause the subject-matter of the seven 'likely' limbs from becoming a reality. Such a purpose was understandable, if not necessary, to prevent any inflammatory publication from tearing apart the fabric of our multi-racial, multi-religious and multi-cultural society (see paras 40–41).

(6) **(per Wong Kian Kheong JCA, majority)** On an objective assessment, the majority of this court was of the view that the book conveyed the general message or impression that homosexuality was permissible in Christianity. As homosexuality was not allowed in Islam, the general message or impression of the book did not promote a harmonious relationship between Christians and the Muslim majority in this country (see paras 45 & 54).

(7) **(per Wong Kian Kheong JCA, majority)** The majority of this court had no hesitation in deciding that a reasonable Minister in A1's position and who was apprised of all the relevant facts and circumstances regarding the book as A1, would be satisfied that the book's general message and impression was likely to prejudice morality, public order and public interest ('the test'). This was because: (a) the Malaysian public generally considered homosexuality to be immoral; and (b) the book had the potential to disrupt public tranquility or the even tempo of life in in the country since there would be public disaffection if the authorities allowed the book to be printed, sold and circulated when homosexual acts were criminalised in ss 377A and 377B of the Penal Code. Such disaffection could lead to public unrest or riot. Such a potential was prejudicial to public interest and brought no good, benefit or advantage to society. In failing to apply the test, the High Court judge had committed an error of law which warranted appellate intervention (see paras 47, 49, 51 & 53).

(8) **(per Wong Kian Kheong JCA, majority)** The High Court judge also committed appealable errors of law and fact when she: (a) found that A1 had 'dissected significant excerpts of the book' although A1 in his affidavit had stated that he had read the entire book; (b) relied on a judgment of the Indian Supreme Court (in *Radhakrishnan*'s case) which decided on the application of art 19(2) of the Constitution of India when the wording in art 19(2) was materially different from that contained in art 10(2)(a) of our Federal Constitution; and (c) relied upon s 4(4) of the HRCMA to justify the application of the UDHR in this case. Section 4(4) of HRCMA had not provided for UDHR to be legally binding per se in this country. UDHR would only be enforceable if Parliament had expressly provided in an Act of Parliament that UDHR was legally binding. Furthermore, HRCMA did not provide that the exercise of the Minister's discretionary power under s 7(1) of the PPPA was subject to UDHR (see paras 55, 57 & 59).

(9) **(per Wong Kian Kheong JCA, majority)** The High Court judge had taken into account irrelevant matters when she decided to allow the respondents' judicial review application. The fact that for a period of more than seven years since its publication the book had not caused any untoward incident, the absence of evidence of how many copies of the book had been published, sold, circulated and possessed by Malaysians, the fact that the appellants had not adduced evidence of the views of different religious and cultural groups in Malaysian society with regard to the book and had not produced any expert opinion to rebut the respondent's expert's opinion regarding the book were all irrelevant matters for the purpose of deciding whether or not there was a likelihood of the book prejudicing morality, public order or public interest. This was another ground for appellate intervention in this case (see paras 60–61).

(10) **(per Wong Kian Kheong JCA, majority)** A comparison between ss 7(1), 7(3) and 13B of the PPPA showed that Parliament intended to exclude a right of hearing to any person who was interested in a publication and had a legitimate expectation in respect of the publication before a decision to ban the publication under s 7(1) of the PPPA was made. The High Court judge erred in holding that the respondents had a constitutional right to be heard before the ban order was issued (see paras 63, 66 & 69).

(11) **(per Wong Kian Kheong JCA, majority)** A1 had not committed any error of law or procedural impropriety in issuing the ban order on the book. Neither was his decision irrational nor disproportionate in all the circumstances of the case (see para 71).

[Bahasa Malaysia summary

Responden pertama ('R1') pada September 2013 telah menerbitkan dan mengedarkan buku bertajuk 'Gay is OK! A Christian Perspective' ('buku tersebut') yang dikarang oleh responden kedua. Pada November 2020, perayu pertama ('A1') mengeluarkan perintah di bawah s 7(1) Akta Mesin Cetak dan Penerbitan 1984 ('AMCP') yang melarang pencetakan, pengimportan, pengeluaran, pengeluaran semula, penerbitan, penjualan, pengeluaran, pembuatan, pengagihan dan pemilikan buku tersebut atas alasan ia mengandungi perkara-perkara yang berkemungkinan menjejaskan ketenteraman awam, moral dan kepentingan awam. Dalam membatalkan perintah larangan A1 selepas mendengar permohonan semakan kehakiman yang difailkan oleh responden, Mahkamah Tinggi ('MT') mendapati, antara lain, bahawa: (a) buku tersebut tidak menyebabkan sebarang kejadian tidak diingini dalam tempoh tujuh tahun sejak ia mula diterbitkan; (b) tiada keterangan tentang berapa banyak naskhah buku tersebut telah dicetak, diterbitkan atau diedarkan sebelum perintah larangan berkuat kuasa; (c) A1 hanya mempertimbangkan pandangan terhad terhadap sekumpulan orang pada agama tertentu yang menentang buku tersebut dan tidak mengambil kira pandangan masyarakat Malaysia secara keseluruhan terhadap buku tersebut; (d) A1 telah, tanpa asas keterangan, membuat kesimpulan bahawa homoseksualiti bukan sahaja tidak boleh diterima oleh rakyat Malaysia tetapi ia adalah 'kesalahan' di bawah semua agama diamalkan di negara ini (dalam hal ini, A1 tidak mengemukakan sebarang keterangan pakar untuk menyangkal pendapat pakar mengenai buku yang dihasilkan oleh responden); (e) tidak ada asas keterangan untuk mewajarkan larangan tersebut; (f) A1 hanya menumpukan kepada 'petikan' daripada buku tersebut tertentu sahaja dan telah mengambilnya di luar konteks; (g) responden tidak pernah diberi peluang untuk didengari sebelum keputusan larangan buku tersebut dibuat; (h) Keputusan A1 tidak menepati prinsip hak asasi manusia yang terkandung dalam Perisytiharan Hak Asasi Manusia Sejagat ('UDHR') dibaca bersama s 4(4) Akta Suruhanjaya Hak Asasi Manusia Malaysia 1999 ('ASHAM'); dan (i) dalam membuat keputusannya, mahkamah boleh bergantung pada kes India mengenai kebebasan bersuara berdasarkan perkara 19(2) Perlembagaan India. Rayuan semasa adalah terhadap keputusan MT.

Diputuskan, secara majoriti, membenarkan rayuan dan mengetepikan keputusan MT:

(1) **(oleh Gunalan Muniandy HMR, menentang)** Hakim Mahkamah Tinggi dengan betul mengambil kira fakta material berikut dalam membenarkan permohonan semakan kehakiman responden: bahawa buku tersebut telah diterbitkan selama tujuh tahun sejak September 2013, bahawa dari September 2010 hingga April 2011, buku tersebut telah diterbitkan secara meluas dalam portal berita dalam talian Malaysiakini, bahawa tiada keterangan sebarang laporan yang dibuat

oleh mana-mana pihak bahawa buku tersebut telah menimbulkan ancaman kepada ketenteraman awam, moral atau kepentingan awam, bahawa tiada keterangan sebarang tindak balas negatif awam terhadap isu homoseksualiti yang dibangkitkan dalam buku tersebut (insiden yang dirujuk oleh A1 berkaitan dengan tindak balas orang ramai terhadap budaya homoseksual tidak mempunyai kaitan dengan buku tersebut dan tidak juga insiden tersebut mengganggu keselamatan dan ketenteraman awam), tidak ada keterangan tentang berapa banyak salinan buku telah dicetak atau diterbitkan dan sejauh mana ia telah diedarkan untuk menimbulkan ancaman kepada ketenteraman awam (lihat perenggan 15).

(2) **(oleh Gunalan Muniandy HMR, menentang)** Berdasarkan alasan yang dinyatakan dalam perenggan tersebut, hakim Mahkamah Tinggi mendapati bahawa A1 telah gagal untuk mewajarkan larangan buku tersebut. Sekiranya tidak ada keterangan bahawa buku tersebut sebenarnya telah menjejaskan ketenteraman awam selama tujuh tahun penerbitannya, maka buku tersebut tidak mungkin terlalu prejudis. Di samping itu, hakim di bawah dengan betul menyatakan bahawa A1 telah gagal mengemukakan sebarang keterangan bahawa pandangan badan agama yang berbeza dan segmen budaya yang pelbagai dalam masyarakat kita telah diambil kira. Perkara-perkara yang dirujuk oleh A1 dalam afidavit jawapannya mewakili pandangan kumpulan orang yang terhad pada agama tertentu yang sama sekali tidak mewakili pandangan masyarakat Malaysia secara keseluruhan. Mahkamah di bawah dengan betul berpendapat bahawa A1 telah mengambil kira pertimbangan yang tidak relevan, bahawa beliau telah gagal menilai buku tersebut secara objektif dan bahawa beliau telah gagal untuk menunjukkan sebarang keterangan bahawa buku tersebut berkemungkinan memudaratkan ketenteraman awam, moral dan kepentingan awam (lihat perenggan 16–17).

(3) **(oleh Gunalan Muniandy HMR, menentang)** Apabila mendapati A1 tidak membaca dan meneliti kandungan buku tersebut dengan betul dan objektif, hakim di bawah mendapati A1 telah memdedah petikan penting daripada buku tersebut yang dikatakan berkemungkinan boleh menjejaskan ketenteraman awam, moral dan kepentingan awam. Pendekatan ini tidak mewakili maksud sebenar petikan dan perenggan yang disangkal berkenaan kerana A1 telah gagal untuk merujuk kepada teks yang memberikan konteks kepada petikan dan perenggan yang disangkal (lihat perenggan 21).

(4) **(oleh Gunalan Muniandy HMR, menentang)** Hakim di bawah telah menghargai dan menganalisis semua fakta dan keadaan kes secara kehakiman dan telah menilai dengan secukupnya keterangan dalam memutuskan untuk membenarkan permohonan semakan kehakiman.

Beliau tidak terkhilaf prinsip atau fakta dalam berbuat demikian (lihat perenggan 22–23).

(5) **(oleh Wong Kian Kheong HMR, majoriti)** Di bawah s 7(1) AMCP, Menteri boleh menggunakan kuasa budi bicaranya mengenai penerbitan bukan sahaja jika ia mengandungi apa-apa yang sebenarnya memudaratkan ketenteraman awam, moral, keselamatan, kepentingan awam atau kepentingan negara tetapi juga jika ia berkemungkinan berbuat demikian atau jika penerbitan berkemungkinan membimbangkan orang ramai atau bertentangan dengan mana-mana undang-undang atau berkemungkinan bertentangan dengan mana-mana undang-undang. Tujuan tujuh bahagian 'kemungkinan' tersebut adalah untuk memberi Menteri kuasa pencegahan untuk melarang mana-mana penerbitan yang berpotensi menyebabkan subjek tujuh bahagian 'kemungkinan' menjadi kenyataan. Tujuan sedemikian boleh difahami, jika tidak perlu, untuk mengelakkan sebarang penerbitan yang menghasut daripada mengoyakkan fabrik masyarakat kita yang berbilang kaum, agama dan budaya (lihat perenggan 40–41).

(6) **(oleh Wong Kian Kheong HMR, majoriti)** Pada penilaian objektif, majoriti mahkamah ini berpendapat bahawa buku tersebut menyampaikan mesej atau tanggapan umum bahawa homoseksualitas dibenarkan dalam agama Kristian. Memandangkan homoseksualiti tidak dibenarkan dalam Islam, mesej atau tanggapan umum buku terseut tidak menggalakkan hubungan harmoni antara Kristian dan majoriti Muslim di negara ini (lihat perenggan 45 & 51).

(7) **(oleh Wong Kian Kheong HMR, majoriti)** Majoriti mahkamah ini tidak teragak-agak dalam memutuskan bahawa seorang Menteri yang munasabah dalam kedudukan A1 dan yang telah dimaklumkan tentang semua fakta dan hal keadaan yang berkaitan mengenai buku tersebut kerana A1, akan berpuas hati bahawa mesej dan tanggapan umum buku tersebut berkemungkinan memprejudis moral, ketenteraman awam dan kepentingan awam ('ujian tersebut'). Ini adalah kerana: (a) masyarakat Malaysia secara umumnya menganggap homoseksualiti sebagai tidak bermoral; dan (b) buku tersebut berpotensi mengganggu ketenteraman awam atau bahkan rentak kehidupan di negara ini kerana akan wujud ketidakpuasan hati orang ramai jika pihak berkuasa membenarkan buku tersebut dicetak, dijual dan diedarkan apabila perbuatan homoseksual telah dijenayahkan dalam ss 377A dan 377B Kanun Keseksaan. Ketidakpuasan hati sedemikian boleh menyebabkan kekacauan atau rusuhan awam. Potensi sedemikian memudaratkan kepentingan awam dan tidak membawa kebaikan, faedah atau kelebihan kepada masyarakat. Dalam kegagalan untuk menggunakan ujian tersebut, hakim Mahkamah Tinggi telah melakukan kekhilafan undang-undang yang memerlukan campur tangan rayuan (lihat perenggan 47, 49, 51 & 53).

(8) **(oleh Wong Kian Kheong HMR, majoriti)** Hakim Mahkamah Tinggi juga melakukan kekhilafan undang-undang dan fakta yang boleh dirayu apabila beliau: (a) mendapati A1 telah 'membedah petikan buku yang penting' walaupun A1 dalam afidavitnya telah menyatakan bahawa beliau telah membaca keseluruhan buku tersebut; (b) bergantung pada penghakiman Mahkamah Agung India (dalam kes Radhakrishnan) yang memutuskan pemakaian perkara 19(2) Perlembagaan India apabila perkataan dalam perkara 19(2) berbeza secara material daripada yang terkandung dalam perkara 10(2)(a) Perlembagaan Persekutuan kita; dan (c) bergantung kepada s 4(4) ASHAM untuk mewajarkan penggunaan PHAMS dalam kes ini. Seksyen 4(4) ASHAM tidak memperuntukkan PHAMS mengikat secara sah di negara ini. PHAMS hanya boleh dikuatkuasakan jika Parlimen telah memperuntukkan dengan jelas dalam Akta Parlimen bahawa PHAMS mengikat secara sah. Tambahan pula, ASHAM tidak memperuntukkan bahawa pelaksanaan kuasa budi bicara Menteri di bawah s 7(1) AMCP adalah tertakluk kepada PHAMS (lihat perenggan 55, 57 & 59).

(9) **(oleh Wong Kian Kheong HMR, majoriti)** Hakim Mahkamah Tinggi telah mengambil kira perkara yang tidak berkaitan apabila beliau memutuskan untuk membenarkan permohonan semakan kehakiman responden. Hakikat bahawa untuk tempoh lebih tujuh tahun sejak penerbitannya buku tersebut tidak menyebabkan sebarang kejadian yang tidak diingini, ketiadaan keterangan tentang berapa banyak salinan buku tersebut telah diterbitkan, dijual, diedarkan dan dimiliki oleh rakyat Malaysia, fakta bahawa perayu tidak mengemukakan keterangan pandangan kumpulan agama dan budaya yang berbeza dalam masyarakat Malaysia berkaitan buku tersebut dan tidak mengeluarkan sebarang pendapat pakar untuk menyangkal pendapat pakar responden berkenaan buku tersebut adalah semua perkara yang tidak relevan untuk tujuan memutuskan sama ada atau tidak terdapat kemungkinan buku tersebut menjejaskan moral, ketenteraman awam atau kepentingan awam. Ini adalah satu lagi alasan untuk campur tangan rayuan dalam kes ini (lihat perenggan 60–61).

(10) **(oleh Wong Kian Kheong HMR, majoriti)** Perbandingan antara ss 7(1), 7(3) dan 13B AMCP menunjukkan bahawa Parlimen berhasrat untuk mengecualikan hak pendengaran kepada mana-mana orang yang berkepentingan dalam penerbitan dan mempunyai jangkaan yang sah berkenaan dengan penerbitan sebelum keputusan larangan penerbitan di bawah s 7(1) AMCP dibuat. Hakim Mahkamah Tinggi terkhilaf dalam memutuskan bahawa responden mempunyai hak perlembagaan untuk didengar sebelum perintah larangan dikeluarkan (lihat perenggan 63, 66 & 69).

(11) **(oleh Wong Kian Kheong HMR, majoriti)** A1 tidak melakukan

sebarang kekhilafan undang-undang atau ketidakwajaran prosedur dalam mengeluarkan perintah larangan ke atas buku tersebut. Mahupun keputusannya juga tidak rasional atau tidak seimbang dalam semua keadaan kes itu (lihat perenggan 71).]

Cases referred to

Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors [2013] 5 MLJ 174, CA (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312, FC (refd)
Chong Chong Wah & Anor v Sivasubramanian [1974] 1 MLJ 38, FC (refd)
Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307, FC (refd)
Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia) [2012] 6 MLJ 340, CA (refd)
Hew Kuan Yau v Menteri Dalam Negeri & Ors [2022] MLJU 1571; [2022] 8 CLJ 880, CA (refd)
Islamic Renaissance Front Bhd v The Minister of Home Affairs [2020] 5 MLJ 399, CA (refd)
Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)
Kraft Foods Schweiz Holding GmbH v Pendaftar Cap Dagangan [2016] 11 MLJ 702, HC (refd)
Life Insurance Corporation of India v Prof Manubhai D Shah (1992) 2 SCC 637 (refd)
Lim Hui Lian v CM Huddlestan [1979] 2 MLJ 134 (refd)
Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351, SC (refd)
Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri [2018] 3 MLJ 14; [2018] 9 CLJ 496, CA (refd)
N Radhakrishnan @ Radhakrishnan Varenickal v Union of India [2018] 7 MLJ 628, SC (refd)
Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] MLJU 760; [2004] 2 CLJ 777, FC (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another suit [2014] MLJU 1874; [2015] 2 CLJ 328, CA (refd)
Zi Publications Sdn Bhd v Timbalan Menteri Dalam Negeri & Ors [2014] 3 MLRH 708, HC (refd)

Legislation referred to

Constitution of India [IND] art 19(1)(a), (2)
Federal Constitution arts 4(2)(b), 5, 5(1), 6, 7, 8, 8(1), 9, 10, 10(1)(a), (2)(a), 11, 12, 13, 19(1)(a), 160(2)
Human Rights Commission of Malaysia Act 1999 s 4(4)
Penal Code ss 377A, 377B
Printing Presses and Publications Act 1984 ss 2, 7, 7(1), (3), 13B

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Edmund Bon Tai Soon (with Michael Cheah Ern Tien) (Amerbon) for the respondent.

Gunalan Muniandy JCA (delivering minority judgment of the court):

INTRODUCTION

[1] With due respect to my learned sister and brother (the majority judges), I am constrained to depart from the majority decision to allow the appeal and reverse the decision of the learned judge of the High Court ('LJ') in the respondents' judicial review application ('JR').

[2] I have given careful consideration to the submissions of both parties on the law and the present factual matrix as well as the grounds of judgment ('GOJ') of the LJ who had explained at length her reasons for granting the orders sought by the respondents ('R1' and 'R2') .

[3] In my judgment, the LJ had given adequate consideration to the surrounding facts and circumstances as a whole and correctly applied relevant principles of law to the same before concluding that the decision of the first appellant ('A1') ought to be quashed for, amongst others, being irrational and in breach of established rules of natural justice.

[4] In particular, that the respondents had been wholly denied the right to be heard before the drastic action taken by A1 against publication of the book in question by way of the ban.

[5] As the LJ had set out in detail the factual matrix leading up to the banning of the book, I do not propose to state the facts which are mainly undisputed.

[6] Importantly, in my considered view, the LJ had looked at the impugned publication in its proper context having taken into account the prevailing circumstances and not in isolation or in a vacuum as purportedly done by the Minister ('A1') in deciding to ban the book merely based on his subjective opinion as to what it sought to convey on the subject of homosexuality.

[7] In gist, the respondents' contentions as summarised are these:

(a) the ban is illegal as the book is a form of expression protected by art 10(1)(a) of the Federal Constitution ('the FC');

(b) the book is unlikely to be prejudicial to public order, morality and public interest;

(c) the ban was a disproportionate fetter to the applicants' freedom of expression and right to equal treatment;

(d) the ban is irrational, disproportionate/excessive because the first respondent ('A1') failed to take into account relevant considerations and had instead, taken into account irrelevant considerations; and

(e) there is procedural impropriety as the applicants were not given the right to be heard before the ban which goes against the right to be heard guaranteed under the doctrine of legitimate expectation.

[8] In contrast, the appellants submit that the LJ's finding as summarised that the book does not promote homosexuality was erroneous in fact for the following reasons:

(a) based on the first respondent's examination of the contents of the book as a whole and contextually, the book does not merely provide an alternative view on the subject of homosexuality, but the book actually defends, promotes and encourages homosexuality;

(b) the fact that the book actually defends, promotes and encourages homosexuality is apparent based on the overall tone of the contents of the book which is written in a non-sedentary and passionate language to defend, promote and encourage homosexuality; and

(c) a comparison can be made with the manner in which the expert opinion report is written by Wan Wei Hsien which is couched in a sedentary and dispassionate language to provide his opinion. Unlike the book, the expert opinion report cannot be said to be defending, promoting and encouraging homosexuality.

[9] As to the LJ's finding that the book was unlikely to be prejudicial to public order, the appellants submit that this finding too was incorrect for these reasons:

(a) the fact that the book had been in publication for seven years did not equate to the book having been widely circulated in society. These was no proof of wide circulation;

(b) the fact of limited, and not wide, circulation was evident from the fact that it was found by the enforcement officer concerned during a random inspection at the bookstore concerned;

(c) thus, even though the book had been in publication for seven years, it had not been widely circulated in society. As such, the Minister was not wrong in holding the opinion that it had the potential to prejudice

public order if it were to be widely circulated or if it went viral. It could trigger uproar and even violence among certain sections of our multiracial and multireligious nation; and

(d) there was already evidence of the potentiality of prejudice based on the reaction of some sections of society that held a large scale assembly protesting against LGBT and homosexuality, albeit not because of the book. The potentiality of prejudice could, thus, not be eliminated considering prevailing public opinion.

[10] I have no disagreement with the appellant's proposition that the objective test to be applied is whether a reasonable Minister apprised of the facts would objectively be satisfied that the book contains contents which are likely to be prejudicial to public order, likely to be prejudicial to morality and likely to be prejudicial to public interest. However, I am constrained to hold that each case must be decided on its own peculiar facts and circumstances and that, on the peculiar facts and circumstances of the instant case, the LJ had rightly applied the objective test. As her finding thereof was not shown to be plainly wrong, unreasonable or perverse, no appellate intervention was justifiable in this instance. I am unable to accede to the appellants' contention that in principle it is appropriate for the first appellant to decide that the book contains contents which are likely to be prejudicial to public order, likely to be prejudicial to morality and likely to be prejudicial to public interest on these grounds:

(a) the first appellant satisfied the objective test in imposing the ban against the book; and

(b) it is appropriate for the first appellant to examine the contents of the book in the eyes of a lay person because the book is published for a lay person regardless of the background. Such examination cannot be regarded as a subjective assessment of the book.

[11] In *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another suit* [2014] MLJU 1874; [2015] 2 CLJ 328 at p 339 the Court of Appeal remarked that:

> ... Where an administrative power is granted as a subjective discretion, courts will subject its exercise to review based on an objective assessment (*Mohamad Ezam Mohd Noor v Ketua Polis Negara and other appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 *Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351; [1990] 1 CLJ 699; [1990] 1 CLJ Rep 186 *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307; [2010] 1 CLJ 300). The test is that of whether a reasonable minister similarly situated would have acted in the same manner. The courts can test the exercise of the subjective discretion against objective facts in order to determine whether the discretion has been fairly and justly exercised ...

[12] In relation to the action taken by R1 in the High Court (first appellant) the LJ pointed out that:

> In the instant case, the first respondent ('R1') had exercised his absolute discretion to impose the ban upon being satisfied that the book contains contents which are likely to be prejudicial to public order, morality and public interest. In his affidavit, the first respondent has averred that he found the contents of the book as a whole and contextually to be promoting, defending and encouraging homosexuality. In imposing the ban under s 7(1) of the Act, the ground relied upon by R1 is that the contents of the book are likely to be prejudicial and not prejudicial to the public order where both carry different meanings. On behalf of the respondents, learned federal counsel ('FC') argued that if it is likely to be prejudicial to public order.

[13] According to the learned FC, it would encompass any statement or publication that had the potential to disrupt public order. Where it was likely to be prejudicial to public order it would be sufficient to show the potentiality of the prejudice for s 7(1) the Act to be triggered to impose the ban.

[14] It was the LJ's considered view, with which I am firmly in concurrence, that the averments by the first appellant alluded to cannot be sustained in relation to be book.

[15] To my mind the LJ had correctly taken into account, the following material facts pertinent to the issue at hand:

(a) there was no dispute that the book had been in publication for seven years since September 2013;

(b) from September 2010–April 2011 it had been published widely in the Malaysikini online news portal;

(c) there was no evidence of any reports made by any party that the book had posed a threat to public order, public morality or went against the public interest;

(d) there was no evidence of any negative response from the public to the issue of homosexuality raised in the book. The incidents referred to by the first appellant relating to public response to the culture of homosexuality had no connection with the book nor did the said incidents disrupt public safety and tranquillity; and

(e) no evidence was adduced as to how many copies of the book had been printed or published and how widely it had been circulated to pose a threat to public order on which the ban was predicated.

[16] On the above grounds, the LJ arrived at her finding that the first appellant has failed to justify the ban on the ground that the book is likely to cause prejudice to public order under s 7(1) of the Act. After more than seven

years of the publication of the book, the first appellant had failed to show evidence of actual prejudice to public order that had occurred. When no such evidence is adduced, it follows that the book was in the first place unlikely to be prejudicial to public order. Additionally, the LJ correctly remarked that the first appellant had failed to adduce evidence that the views amongst the different religious bodies and diverse cultural segments of our society have been taken into consideration. At most, the incidences referred to by the first appellant in the affidavit in reply represent views of a limited group of persons or individuals of a particular religion which in no way represent current the view of the Malaysian society as a whole.

[17] In my considered opinion, the submission of the appellants on the above grounds is without merit. On the contrary, the LJ had correctly held that the first appellant had failed to justify the ban on the grounds that the book is likely to be prejudicial to public order, morality and public interest premised on the reasoning that:

(a) there was no evidence of such grounds;

(b) the first appellant had taken into account irrelevant considerations; and

(c) the first appellant failed to assess the book objectively.

As correctly highlighted by the respondents, the book is a from of expression fundamentally protected by art 19(1)(a) of the Federal Constitution ('the FC') (see *Life Insurance Corporation of India v Prof Manubhai D Shah* (1992) 2 SCC 637).

[18] Likewise, that freedom of expression can be limited by federal law under art 10(2)(a) of the Federal Constitution on certain specific grounds only, namely, national security, public order, morality, restrictions designed for the protection of the privileges of Federal and State Legislatures, and to provide against contempt of court, defamation or incitement to any offence. An example of such a federal law as the Printing Presses and Publication Act.

[19] It is also well settled that although s 7(1), PPPA provides that the decision of first appellant on whether a given publication is likely to be prejudicial to public order, morality or public interest is at his 'satisfaction' and he has 'absolute discretion' to decide how to control that publication, this first appellant's discretionary power can and must be objectively assessed by the courts (see: *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307 (FC)). This can also be seen from the following cases where book bans were challenged:

(a) *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another suit* [2014] MLJU 1874; [2015] 2 CLJ 328 (CA) (encl 15, pp 112–141);

(b) *Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri* [2018] 3 MLJ 14; [2018] 9 CLJ 496 (CA) (encl 15, pp 142–161);

(c) *Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340 (CA) (encl 15, pp 162–169);

(d) *Zi Publications Sdn Bhd v Timbalan Menteri Dalam Negeri & Ors* [2014] 3 MLRH 708 (HC) (encl 15, pp 170–180); and

(e) *Hew Kuan Yau v Menteri Dalam Negeri & Ors* [2022] MLJU 1571; [2022] 8 CLJ 880 (CA) (encl 15, pp 181–201).

[20] It is indisputable principle that if the first appellant in any way exercised his discretion wrongfully, unfairly, dishonestly or in bad faith, the courts can exercise their jurisdiction in reviewing the decision (see: *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351 (SC) (encl 15, pp 202–207) and *Chong Chong Wah & Anor v Sivasubramanian* [1974] 1 MLJ 38 (FC) (encl 15, pp 208–211)).

[21] I do not agree with the appellants' contention that the LJ had erred in finding that the first appellant had not properly and objectively read and examined the contents of the book. In her judgment, the LJ had found that the first appellant had dissected significant excerpts of the book said to be likely to be prejudicial to public order, morality and public interest. Her finding that the approach adopted cannot tantamount to an objective assessment as it did not represent the actual meaning of the impugned passages and paragraphs was not, in my view, incorrect or erroneous. Further, the texts giving context to the said paragraphs and passages were found to have been omitted by the first appellant in deciding that the contents of the book have a prejudicial effect or posed a threat to public order, morality, etc.

[22] Having duly considered the above views and findings of the LJ, I would respectfully conclude that the LJ had judicially appreciated and analysed the surrounding facts and circumstances as well as had adequately evaluated the evidence in arriving at her conclusion as alluded to. Notwithstanding, the COA decision in *Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri* [2018] 3 MLJ 14; [2018] 9 CLJ 496, it is trite law that when it comes to the determination of the present factual issue as to whether a publication is prejudicial to public order, morality, etc each case must turn on its own peculiar facts. This is exactly how the LJ deliberated upon the core issue in the JR, having taken into account the totality of the evidence before the court.

[23] Lastly, in my judgment, the LJ had not erred in principle or fact in her decision to allow the respondents' JR application on the basis that the grounds in support of the JR had merits and substance to justify the order made by the first appellant to be quashed by an order of certiorari.

[24] I would therefore, respectfully dismiss this appeal and affirm the decision and orders of the HC. A

Wong Kian Kheong JCA (delivering majority judgment of the court):

A. INTRODUCTION B

[25] On 25 September 2023:

(1) my learned sister, Azizah Hj Nawawi JCA, and I ('majority coram') had allowed this appeal with costs ('majority decision'); and C

(2) my learned brother, Gunalan a/l Muniandy JCA, had given a dissenting opinion.

[26] This judgment ('majority judgment') provides the reasons for the majority decision and a draft of the majority judgment has been given to Gunalan a/l Muniandy JCA. D

B. BACKGROUND

[27] The first respondent ('first respondent') is the sole proprietor of a business named 'Gerakbudaya Enterprise' which publishes and distributes books. E

[28] The second respondent ('second respondent') wrote a book entitled 'Gay is OK! A Christian Perspective' ('book') which was published and distributed by the first respondent in September 2013. F

[29] The first part of the book consisted of a compilation of articles written by the second respondent which had been published in 'Malaysiakini' from September 2010 to April 2011. G

[30] On 18 February 2020:

(1) an Assistant Enforcement Officer from the Regulatory and Enforcement Division ('Enforcement Division') of the Ministry of Home Affairs ('MHA), conducted a random inspection of books which were displayed for sale in the first respondent's bookstore in No 2, Jalan Bukit 11/2, 46200 Petaling Jaya, Selangor Darul Ehsan; and H

(2) the MHA officer bought the book from the first respondent for a review and examination by MHA under the Printing Presses and Publications Act 1984 ('the PPPA'). I

[31] With regard to the book:

(1) the book was first reviewed and examined by the Enforcement Division;

(2) the Enforcement Division then submitted the book to the first appellant, Minister of Home Affairs ('first appellant');

(3) the first appellant had reviewed the contents of the book and was satisfied that the book had contained matters which were likely to be prejudicial to:

(a) public order;

(b) morality; and

(c) public interest;

(4) on 17 November 2020, the first appellant issued an order under s 7(1) of the PPPA to prohibit absolutely the printing, importation, production, reproduction, publication, sale, issue, circulation, distribution and possession of the book ('ban'). The ban was published in the federal *gazette* on 17 November 2020 ('*gazette* notification (ban)').

C. PROCEEDINGS IN THE HIGH COURT (HC)

[32] The first and second respondents (referred collectively in this majority judgment as the 'respondents') filed an application in the HC against the first appellant and the Malaysian Government ('second appellant') for, among others, an order of certiorari to quash the ban ('judicial review application'). This majority judgment shall refer to the first and second appellants collectively as the 'appellants'.

[33] The HC granted leave for the judicial review application.

[34] The learned HC judge subsequently allowed the judicial review application as follows:

(1) a certiorari order was granted to quash the ban; and

(2) the appellants shall pay costs in a sum of RM5,000 to the respondents ('HC's decision').

[35] The appellants have appealed to this court against the HC's decision ('this appeal').

D. GROUNDS FOR HC'S DECISION

[36] According to the grounds of judgment for the HC's decision ('GOJ'), among others:

(1) para 12 GOJ — the book offered an alternative view that Christianity does not oppose homosexuality; A

(2) paras 17–19, 23 and 33 GOJ — the publication of the book was not likely to be prejudicial to public order. Since the publication of the book in September 2013, there was no untoward incident which arose from the book; B

(3) para 21 GOJ — there was no evidence of how many copies of the book had been printed, published or circulated before the ban;

(4) para 27 GOJ — the response by members of society referred to by the first appellant could not be accepted to represent an accepted view in recent times of either right or wrong by right-thinking members of society as whole; C

(5) para 28 GOJ — there was no evidence that the views of different religious and diverse cultural segments of society had been taken into consideration by the first appellant. At most, the incidences referred to by the first appellant represent the views of a limited group of persons of a particular religion which in no way represents the Malaysian society as a whole; D E

(6) para 29 GOJ — there was no support for the first appellant's averment that homosexuality is a practice or culture which is not accepted by the entire society of Malaysia and is an 'offence' in all the religions in this country. The respondents had provided an expert opinion by Dr Wan Wei Hsien, an Adjunct Lecturer (Religion and Philosophy) at Methodist College, Kuala Lumpur ('Dr Wan's expert opinion'). The first appellant did not adduce any expert evidence to rebut Dr Wan's expert opinion; F

(7) para 31 GOJ — the HC relied on a judgment of the Indian Supreme Court in *N Radhakrishnan @ Radhakrishnan Varenickal v Union of India* [2018] 7 MLJ 628 (Madras Law Journal) ('*Radhakrishnan*'s case') which decided on the application of art 19(2) of the Indian Constitution ('the IC'); G

(8) para 32 GOJ — there must be an evidential basis for the first appellant's justification of the ban; H

(9) para 33 GOJ — the first appellant had 'in fact dissected significant excerpts' of the book said to be likely to be prejudicial to public order, morality and public interest. Such an approach was not an objective assessment. The texts in the book which gave context to the passages in the book referred to by the first appellant, had been omitted by the first appellant. The passages in the book referred to by the first appellant were not 'significant' because the passages were contained in 42 out of 226 pages of the book; I

(10) paras 34 and 35 GOJ — by virtue of arts 5(1) and 8(1) of the Federal Constitution ('the FC'), the respondents have a constitutional right to be heard before the ban was imposed by the first appellant;

(11) para 37 GOJ — the learned HC judge relied on, among others, the Court of Appeal's decision in *Islamic Renaissance Front Bhd v The Minister of Home Affairs* [2020] 5 MLJ 399 to arrive at the HC's decision;

(12) para 38 GOJ — by virtue of the doctrine of legitimate expectation, the respondents had a right to be heard before the Ban was imposed by the first appellant. Fundamental liberties guaranteed in arts 5–13 of the FC encompass human rights principles contained in the Universal Declaration of Human Rights ('UDHR') read with s 4(4) of the Human Rights Commission of Malaysia Act 1999 ('the HRCMA');

(13) para 40 GOJ — as the respondents were not given a right to be heard before the imposition of the ban, the ban was 'indefensible'; and

(14) paras 41–43 GOJ — the first appellant did not give any reason for the ban.

E. ISSUES

[37] The following questions will be decided in this majority judgment:

(1) can the court review the merits of the exercise of the Minister of Home Affairs' ('Minister') discretionary power under s 7(1) of the PPPA to prohibit any 'publication' (defined widely in s 2 of the PPPA) ('Minister's decision')?

(2) if the court can review the merits of the Minister's decision, what is the applicable test? In this regard:

(a) whether the court can rely on:

(i) Indian cases on freedom of speech which are based on art 19(2) of the IC; and

(ii) UDHR and s 4(4) of the HRCMA to review the Minister's decision;

(b) whether the Minister is required to consider the following matters before making the Minister's decision:

(i) the fact that no untoward incident has arisen out of the printing, sale, circulation and possession of the publication;

(ii) the number of copies of the publication which has been published, sold, circulated and possessed by Malaysians;

(iii) the view and/or response by Malaysian society or any part thereof to the publication, if any; and

(iv) any expert opinion regarding the publication and if there is an expert view on the publication ('first expert opinion'), is the Minister obliged to procure another expert opinion to support or rebut the first expert opinion?

(3) whether the Minister is required by arts 5(1) and 8(1) of the FC to give a right of hearing to any person who:

(a) is 'interested' in a publication; and

(b) has a legitimate expectation with regard to the publication before the Minister's decision is made. This issue entails a comparison between s 7(1) of the PPPA on the one hand and ss 7(3) and 13B of the PPPA on the other hand.

(4) did the Minister give any reason for the Minister's decision?

F. WHETHER COURT CAN REVIEW MERITS OF MINISTER'S DECISION

[38] We reproduce below arts 4(2)(b), 5(1), 8(1), 10(1)(a), (2)(a) of the FC, the definition of 'publication' in s 2 of the PPPA and s 7 of the PPPA:

FC:

Article 4

...

(2) *The validity of any law shall not be questioned on the ground that —*

(a) ...

(b) *it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.*

...

Article 5 Liberty of the person

(1) *No person shall be deprived of his life or personal liberty save in accordance with law.*

Article 8 Equality

(1) *All persons are equal before the law and entitled to the equal protection of the law.*

Article 10 Freedom of speech, assembly and association

(1) *Subject to Clauses (2)*, (3), (3A) and (4) —

(a) *every citizen has the right to freedom of speech and expression*;

...

(2) Parliament may by law impose —

(a) *on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence*;

PPPA:

s 2

'publication' includes —

(a) a document, newspaper, *book* and periodical;

(b) *all written or printed matter* and everything whether of a nature familiar to written or printed matter or not containing any visible representation;

(c) *anything which by its form, shape or in any manner is capable of suggesting words or ideas*; and

(d) an audio recording;

s 7 Undesirable publications

(1) *If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.*

(2) In the case of a publication originating in any country outside Malaysia, an order under subsection (1) may, if the order so provides —

(a) prohibit the importation of any or all publications whether before or after the date of the order, subject to such conditions as may be prescribed therein;

(b) in the case of a periodical publication, prohibit the importation of any past or future issue thereof;

(c) in the case of a publication which has been issued or appears or purports to have been issued from any publishing house, agency or other source specified in the order, prohibit the importation of any other publication which may at any time whether before or after the date of the order has

been, or appears or purports to have been, issued from the specified publishing house, agency or other source;

(d) require the publisher thereof to make such deposits of such amount and in such manner as may be prescribed therein before any such publication may be imported.

(3) *Where the Minister is satisfied that the publisher of any publication has acted in contravention of the Act or any rules or order made thereunder or any condition of the licence or permit or any law relating to sedition or defamation, he may after giving such publisher an opportunity to show cause why the deposit made under paragraph 2(d) should not be forfeited, order the deposit or part thereof to be forfeited.*

(4) *Whether or not an order has been made under subsection (3) the court may order the deposit or any balance thereof, if any —*

(a) to be forfeited where the publisher fails to appear in court to answer any criminal charge or civil action relating to any matter in connection with such publication; or

(b) to be paid out in settlement of any judgment obtained against the publisher arising out of any proceeding in connection with such publication.

(5) Where a deposit made under paragraph 2(d) is ordered to be forfeited or utilized in settlement of any damages under subsection (3) or (4), the order of prohibition under subsection (1) shall become absolute unless the publisher makes a further deposit as may be required by the Minister.

(6) *A local or foreign publisher shall be responsible and liable for any action in respect of any material published in his publication.* (Emphasis added.)

[39] The majority coram is of the following view:

(1) according to art 10(2)(a) of the FC, Parliament may by 'law' (defined in art 160(2) of the FC to include 'written law') impose 'restrictions' on the 'freedom of speech and expression' in art 10(1)(a) of the FC as Parliament 'deems necessary or expedient in the interest of the security of the Federation or any part thereof, ..., public order or morality'.

PPPA is a written law legislated by Parliament pursuant to art 10(2)(a) of the FC. By virtue of art 4(2)(b) of the FC, the validity of PPPA shall *not* be questioned on the ground that PPPA imposes such restrictions as are mentioned in art 10(2)(a) of the FC but those restrictions are not deemed necessary or expedient by Parliament for the purposes mentioned in art 10(2)(a) of the FC. In any event, there is a 'strong presumption' that PPPA is constitutional and the burden of proof lies on the party seeking to establish the contrary — please refer to the Supreme Court's judgment delivered by Edgar Joseph Jr SCJ in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566

at p 576. In this case, the respondents are not alleging that s 7(1) of the PPPA is unconstitutional; and

(2) the court can review the merits of the exercise of the Minister's decision. Our reasons are as follows:

(a) notwithstanding Parliament's employment of the wide term 'absolute discretion' in s 7(1) of the PPPA, the Legislature has also used the following phrases in that provision:

(i) 'likely to be prejudicial to public order, morality, security';

(ii) 'likely to alarm public opinion';

(iii) 'likely to be contrary to any law'; and

(iv) 'likely to be prejudicial to public interest or national interest'.

The use of the above phrases in s 7(1) of the PPPA clearly shows Parliament's intention that any exercise of 'absolute discretion' by the Minister pursuant to that provision can be reviewed by the court on the existence or non-existence of the likelihood of the matters stipulated in that provision; and

(b) the following Court of Appeal cases have decided that a Minister's decision is amenable to judicial review:

(i) in *Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340, at paras [4] and [5], Abdul Wahab Patail JCA has delivered the following judgment:

> [4] *The Minister is vested with absolute discretion to prohibit either absolutely or in part or subject to conditions, a publication and future publications of the publisher concerned provided he is satisfied any part of it is*:
>
> (a) *in any manner prejudicial to or likely to be prejudicial to public order, morality, security; or*
>
> (b) *likely to alarm public opinion; or*
>
> (c) *likely to be contrary to any law; or*
>
> (d) *likely to be prejudicial to public interest or national interest.*
>
> [5] *Although the power to ban is at his absolute discretion, it is dependent upon the Minister being satisfied as to these precedent objective facts.* (Emphasis added.)

(ii) in *Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors* [2013] 5 MLJ 174, at paras [8]–[11], [13] and [14], Apandi Ali JCA (as he then was) has decided as follows:

> [8] *From the above arguments, it seems that the crux of the appellant's*

contention is that the test to be applied on the issue of 'prejudicial to public order' is an objective test instead of a subjective test.

[9] *It is our considered view that the legal issue here is not as simplistic as proposed by the appellant. It is not a clear case of objective test or subjective test. It is a fusion of both! It depends on the wordings of the enabling law that conferred such powers to the Minister. The challenge to the exercise of the Minister's power, in this case, is in respect of the powers under s 7 of the PPPA. It is therefore pertinent to examine closely such given powers which is formulated under s 7(1) of the PPPA ...*

...

[10] *The wordings in s 7(1), 'if the Minister is satisfied' and 'he may in his absolute discretion by order' are clear manifestations of the power being vested personally in the Minister and corollary to that vesting, any exercise of such power is to the subjective satisfaction of the Minister. Here the test for such satisfaction is subjective. It is without doubt a subjective discretionary power of the Minister.*

[11] *Even though there exists the subjective discretionary power of the Minister, it was further argued by the appellant that the law requires an objective assessment be undertaken by the Minister. The appellant relied on the Federal Court decision in Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307; [2010] 1 CLJ 300 *in particular where it reads as follows*: ...

Applying this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

...

[13] *On the issue of irrationality, which is intertwined with the subjective discretionary power of the Minister, which has got to be objectively viewed by the court, it is our judgment that we see no reason to depart from the conclusions of the learned trial judge, who has succinctly written in his grounds of judgment, which, inter alia, reads as follows*:

...

[14] *It is our judgment that on the facts of the case the decision by the Deputy Minister to ban the book is neither so outrageous that defies logic nor against any accepted moral standards. The action taken by the Deputy Minister was one that is needed to be taken in the interest of national security (including public order) for which the executive bears the responsibility and alone has access to sources of information that quality it to decide what the necessary action is. And whether the decision is irrational or not, is a question of facts, to be decided by the judge.* (Emphasis added.)

(iii) according to Mohamad Ariff Yusof JCA in *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another suit* [2014] MLJU 1874; [2015] 2 CLJ 328, at para [10]:

> [10] ... *Where an administrative power is granted as a subjective discretion, courts will subject its exercise to review based on an objective assessment* (*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 *Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186; [1990] 1 MLJ 351 *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307; [2010] 1 CLJ 300). *The test is that of whether a reasonable minister similarly situated would have acted in the same manner. The courts can test the exercise of the subjective discretion against objective facts in order to determine whether the discretion has been fairly and justly exercised*. (Emphasis added.)

(iv) in *Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri* [2018] 3 MLJ 14; [2018] 9 CLJ 496, at paras [18]–[20], Zaleha Yusof JCA (as she then was) has given the following judgment:

> [18] *It cannot be disputed that sub-s 7(1) PPPA gives absolute discretion to the Minister to make such order as the impugned order. See Arumugam a/l Kalimuthu. However, it also cannot be disputed that such discretion must also have legal limits to avoid it being abused ...*
>
> ...
>
> [19] *We must also bear in mind, that it is the appellant's contention that his fundamental rights under the Federal Constitution have been infringed. The recent trend in judicial review as decided by our apex court is that the test used had advanced from the subjective to that of the objective test, if state action affects fundamental right, the court will not only look into procedural fairness but also substantive fairness ...*
>
> [20] *Learned senior federal counsel submitted that the learned High Court judge had followed the objective test. With respect we disagree. In considering the minister's affidavit only and in failing to consider the facts presented by the appellant on the nature and contents of the four books and in treating the prior circulation as irrelevant to the minister's assertion as to the potentiality of the four books to prejudice public order, we find that the learned High Court judge had in fact applied the subjective test. Having said that, the cases of Karam Singh, and Nasharuddin Nasir, which used subjective test could not prevail over Titular Roman Catholic's case. Consequently, with due respect, the learned High Court judge erred when she placed reliance on those two cases*. (Emphasis added.)

G. HOW SHOULD COURT REVIEW MINISTER'S DECISION?

[40] Premised on the wording of s 7(1) of the PPPA, the Minister may exercise his discretionary power regarding a publication in any one of the following circumstances:

(1) if the publication contains anything which is *actually* prejudicial to:

(a) public order;

(b) morality;

(c) security;

(d) public interest; *or*

(e) national interest;

(2) if the contents of the publication are *likely* to be prejudicial to:

(a) public order;

(b) morality; or

(c) security;

(d) public interest; *or*

(e) national interest;

(3) if the publication contains anything which is likely to alarm public; *or*

(4) if the contents of the publication are:

(a) contrary to any law; *or*

(b) likely to be contrary to any law,

('13 alternative limbs (s 7(1) of the PPPA)').

[41] The majority coram is of the view that the test to review the exercise of the Minister's decision is as follows:

(1) whether the grounds for the Minister's decision are based on any one or more of the 13 alternative limbs (s 7(1) of the PPPA) ('grounds (Minister's decision)');

(2) whether a reasonable Minister in the position of the actual Minister and is apprised of all the relevant facts and circumstances as the actual Minister, would be satisfied that the contents of the publication in question fall within any one or more of the grounds (Minister's decision) ('test'); and

(3) Parliament has employed the term 'likely' in seven out of the 13 alternative limbs (s 7(1) of the PPPA) ('seven 'likely' limbs (s 7(1) of the

PPPA)'). The term 'likely' has been construed by the Court of Appeal in *Mohd Faizal*, at para [21], as follows:

> [21] *The order which prohibits the four books, describes the four books as 'is likely to be prejudicial to public order'. The learned High Court judge in para 26 of Her Ladyship's grounds of judgment viewed that the phrase 'prejudicial to public order' does not necessarily refer to the existence of an actual public disorder, but include anything which has the 'potential to disrupt public order'. With due respect, we feel the emphasis ought to be put on the words 'likely to be prejudicial to' and not merely 'prejudicial to public order' as sub-s 7(1) of Act 301 provides for two situations, one is where the publication is prejudicial to public order and the other where it is likely to be prejudicial to public order. In this instant case, the order states that it 'is likely to be prejudicial'. If it is prejudicial to public order, then it must be shown the existence of the actual public disorder. But if it is 'likely to be prejudicial to public order', as in the instant case, then it would cover anything which has the potential to disrupt public order. So in this context, even though we agree with the learned High Court judge, that what needs to be proven here is not 'actual public disorder' but anything which has the potential to disrupt public order; it is not because of the words 'prejudicial to public order' but because the order states 'is likely to be prejudicial to public order'…* (Emphasis added.)

The Court of Appeal in *Mohd Faizal* has differentiated the meaning of 'actual public order' from 'likelihood of prejudice to public order". According to *Mohd Faizal*, the phrase 'likely to be prejudicial to public order' may cover 'anything which has the potential to disrupt public order'. For the seven 'likely' limbs (s 7(1) of the PPPA), the majority coram accepts the meaning of 'likely' as decided in *Mohd Faizal*. The purpose of the seven 'likely' limbs (s 7(1) of the PPPA) is to confer on the Minister a preventive power to ban any publication which has the potential to cause the actual subject matter of the seven 'likely' limbs (s 7(1) of the PPPA) before the subject matter becomes a reality. Such a purpose is understandable, if not necessary, to prevent any inflammatory publication from tearing the fabric of our multi-racial, multi-religious and multi-cultural society.

[42] The application of the test in a particular case depends on the contents of the publication in question and all the relevant facts and circumstances regarding the publication. Accordingly, from the view point of the stare decisis doctrine, cases on the validity or invalidity of Minister's decisions regarding publications pursuant to s 7(1) of the PPPA cannot be binding precedents.

H. WHETHER BAN IS VALID UNDER S 7(1) OF THE PPPA

[43] According to the *gazette* notification (ban), the ban was issued by the Minister on the following three grounds:

(1) the book was likely to be prejudicial to public order;

(2) the book was likely to be prejudicial to morality; and

(3) the book was likely to be prejudicial to public interest,

('three grounds (ban)').

[44] Applying the test, the main issue in this appeal is whether a reasonable Minister in the position of the first appellant and is apprised of all the relevant facts and circumstances regarding the book as the first appellant, would be satisfied that the title and contents of the book fall within any one or more of the three grounds (ban).

H(1). Was the book likely to prejudice 'morality'?

[45] Firstly, the majority coram has perused the title of the book (Gay is OK! A Christian Perspective) ('book's title') and its entire contents ('book's contents'). This majority judgment shall refer to the book's title and book's contents collectively as the 'Book (title and contents)'. On an objective assessment of the book (title and contents), the majority coram finds that the book (title and contents) conveys the general message and/or impression that homosexuality is not objectionable in Christianity and it is therefore permissible in that religion ('general message/impression (book)').

[46] The term 'morality' is not defined in PPPA. The majority coram refers to the following dictionaries which give the meaning of 'morality':

(1) according to 'Oxford English Dictionary' (OED), 'morality' means:

> Moral virtue; *behaviour conforming to moral law or accepted moral standards, esp in relation to sexual matters* personal qualities judged to be good. (Emphasis added.)

(2) 'Black's Law Dictionary' (9th Ed, 2009), at p 1100, gives the following definition of 'morality':

> *morality* (14c)
>
> 1. *Conformity with recognized rules of correct conduct.*
>
> 2. *The character of being virtuous, esp. in sexual matters.*
>
> *[T]he terms 'morality' and 'immorality' … are understood to have a sexual connotation* …' William P Golding, Philosophy of Law 55 (1975). (Emphasis added.)

[47] The majority coram accepts the above meanings of 'morality' as intended by Parliament in s 7(1) of the PPPA. Premised on the above meanings of 'morality', the majority coram has no hesitation to decide that a reasonable Minister in the position of the first appellant and is apprised of all the relevant

facts and circumstances regarding the book as the first appellant, would be satisfied that the general message/impression (book) is likely to prejudice 'morality' (likelihood to prejudice morality). The existence of the likelihood to prejudice morality in this case is premised on the following reasons:

(1) the moral values of Malaysian society do not condone, let alone accept, homosexuality. In other words, homosexuality is considered immoral by Malaysian public;

(2) in the HC case of *Lim Hui Lian v CM Huddlestan* [1979] 2 MLJ 134 at p 135, Yusoff J has decided as follows:

> The petitioner belongs to the Chinese community in Sarawak. She contracted this marriage with the respondent in Canada in June 1972. In July the same year, she returned to Sarawak, followed by the respondent. In 1974 they lived and cohabited at Teacher's quarters at Marudi in the district of Baram. In January 1975 the respondent left the matrimonial home and went to Singapore on his way back to Canada. He had indicated to the petitioner that he would not return.
>
> *While the marriage was subsisting, the petitioner said that the respondent had taken drugs and developed a propensity for homosexuality which she had not encouraged nor consented. During this period in 1974, the respondent had spent most of his time with his male friends of his own race, including some way-ward travellers and drug-takers. The respondent brought these friends back to the matrimonial home and on these occasions he also took drugs and slept with them in the house.*
>
> ...
>
> *Having regard to the petitioner's upbringing as an Asiatic race of Chinese origin, in my opinion, it is reasonable for her to view the act of sodomy with abhorrence and revolt against such conduct. The act of sodomy is considered shameless and unclean by the community to which she belongs. Such despicable conduct though permitted among some westerners should not be allowed to corrupt the community's way of life*. (Emphasis added.)

(3) in view of the reason and HC decision stated in the above sub-paras (1) and (2), a reasonable Minister in the position of the first appellant and is apprised of all the relevant facts and circumstances regarding the book as the first appellant, would have been satisfied that the publication, sale, circulation and possession of the book (book's publication/sale/circulation/possession) in this country has the potential to prejudice morality, namely, there exists a likelihood to prejudice morality with regard to the book.

H(2). Whether book was likely to prejudice 'public order'

[48] According to Gopal Sri Ram FCJ in the Federal Court case of *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ

307, at para [12], an act prejudices 'public order' if the act disrupts:

(1) the 'even tempo of the life of the community';

(2) public safety; or

(3) public tranquillity.

[49] In view of the general message/impression (book), a reasonable Minister in the position of the first appellant and is apprised of all the relevant facts and circumstances regarding the book as the first appellant, would have been satisfied that the general message/impression (book) is likely to prejudice or has the potential to prejudice 'public order' as follows:

(1) the book has the potential to disrupt the even tempo of the life of our community; *and/or*

(2) the book is likely to disrupt public tranquility in Malaysia,

('likelihood to prejudice public order').

The general message/impression (book) would cause the existence of a likelihood to prejudice public order because:

(a) if a male person (X) commits a homosexual act with another male person (Y) by the introduction of X's penis into the anus of Y, this homosexual act constitutes an offence under s 377A (carnal intercourse against the order of nature) of the Penal Code ('the PC') which is punishable with a maximum imprisonment of 20 years and/or whipping under s 377B of the PC; and

(b) if the book is not banned, it is likely that the general message/impression (book) would disrupt the even tempo of the life of our community and/or public tranquility as follows:

(i) there would be disaffection in the Malaysian public with the Malaysian authorities on why the book was allowed to be printed, sold and circulated in this country when homosexuality is criminalised in ss 377A and 377B of the PC (public disaffection); and

(ii) the public disaffection has the potential to lead to public unrest, if not public riot.

H(3). Was book likely to prejudice 'public interest'?

[50] The term 'public interest' is defined in OED as follows:

> *The benefit or advantage of the community as a whole; the public good.* (Emphasis added.)

The majority coram adopts the above ordinary meaning of 'public interest' in

s 7(1) of the PPPA.

[51] In the majority coram's view, a reasonable Minister in the position of the first appellant and is apprised of all the relevant facts and circumstances regarding the book as the first appellant, would have been satisfied that the general message/impression (book) is likely to prejudice or has the potential to prejudice public interest (likelihood to prejudice public interest). This decision is based on the following reasons:

(1) as explained in the above sub-paras 25(a) and (b), the general message/impression (book) has the potential to cause public disaffection which in turn, may lead to public unrest. Such a potential outcome from the book's publication/sale/circulation/possession, is likely to prejudice public interest because the book's publication/sale/circulation/possession does not bring any benefit or advantage to our society as a whole. Nor is there any public good which may arise from the book's publication/sale/circulation/possession; and

(2) the general message/impression (book) conveys to non-Christians in Malaysia that homosexuality is permitted in Christianity. Homosexuality is not allowed in Islam. Accordingly, the general message/impression (book) does not promote a harmonious relationship between Christians and the Muslim majority in this country.

I. DID LEARNED HC JUDGE APPLY THE TEST?

[52] It is trite law that an appellate court can only intervene and set aside a lower court's exercise of discretion when the lower court has:

(1) committed an error of law; or

(2) taken into account an irrelevant consideration in making a decision — please refer to the Federal Court's judgment delivered by Abdull Hamid Embong FCJ in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312, at para [48].

[53] In this case, with respect, the learned HC judge did not apply the test as explained in the above Parts H and H(1) to H(3). This constitutes an error of law on the part of the HC which warrants appellate intervention (first appealable error). If the learned HC judge had applied the Test, it is clear that a reasonable Minister in the position of the first appellant and is apprised of all the relevant facts and circumstances regarding the book as the first appellant, would have been satisfied of the existence of:

(1) likelihood to prejudice morality;

(2) likelihood to prejudice public order; and

(3) likelihood to prejudice public order (referred collectively in this majority judgment as 'likelihood to prejudice morality/public order/public interest').

The evidential basis for the first appellant's justification of the ban was the book (title and contents) which:

(a) conveyed the general message/impression (book); and

(b) gave rise to the likelihood to prejudice morality/public order/public interest.

[54] The existence of likelihood to prejudice morality/public order/public interest distinguishes this case from all the previous cases cited by the respondents' learned counsel, Mr Edmund Bon Tai Soon.

[55] With respect, the learned HCJ made a plain error of fact in deciding that the first appellant 'in fact dissected significant excerpts' of the book (second appealable error) because:

(1) the learned HCJ failed to consider paras 9(e) and 12 of the first appellant's affidavit affirmed on 27 May 2021 (first appellant's first affidavit) which stated that the first appellant had read the entire book. In other words, the first appellant did not 'dissect' the book;

(2) the first appellant was only highlighting the likelihood to prejudice morality/public order/public interest in sub-paras 12(a)–(j) of the first appellant's first affidavit; and

(3) the fact that the first appellant only highlighted passages in 42 out of 226 pages of the book, did not mean that the other 184 pages of the book negate the existence of the likelihood to prejudice morality/public order/public interest.

J. CAN HC RELY ON RADHAKRISHNAN'S CASE?

[56] Article 19(1)(a) and (2) of the IC provide as follows:

> Article 19 *Protection of certain rights regarding freedom of speech*, etc.
>
> (1) *All citizens shall have the right —*
>
> (a) *to freedom of speech and expression*;
>
> ...
>
> (2) *Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable*

restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. (Emphasis added.)

[57] In support of the HC's decision, the learned HC judge has relied on, among others, *Radhakrishnan*'s case. With respect, this constitutes an error of law (third appealable error) due to the following reasons:

(1) art 19(2) of the IC provides that a State in India may make any law which imposes 'reasonable restrictions' on the exercise of the freedom of speech and expression 'in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence'. The wording of art 19(2) of the IC is materially different from our art 10(2)(a) of the FC ('Parliament may by law impose ... on [the freedom of speech and expression as Parliament] deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence'); and

(2) our Supreme Court has decided as follows in *Pung Chen Choon*, at pp 575–576:

> *Clearly, therefore, in Malaysia, the position of the court when considering an infringement of this Right [freedom of speech and expression] is different from that of the position of the court in India when considering an infringement of the equivalent Right under the Indian Constitution.*
>
> *With regard to India, the Indian Constitution requires that the restrictions, even if within the limits prescribed, must be 'reasonable' — and so that court would be under a duty to decide on its reasonableness. But, with regard to Malaysia, when infringement of the Right of freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10(2)(a), the question whether it is reasonable does not arise; the law would be valid. Moreover, by cl (2) of art 4, it is not a ground for challenge that the restriction does not relate to one of the matters specified in art 10(2)(a) for taking a case outside the protection of that article (see Assa Singh v Mentri Besar of Johore at p 38).*
>
> *To put it another way, art 4(2)(b) of the Constitution expressly prohibits the questioning of the validity of any law on the ground that such a law 'imposes restrictions as are mentioned in art 10(2) of the Federal Constitution but those restrictions were not deemed necessary or expedient by Parliament for the purposes*

mentioned in art 10(2). (see *Public Prosecutor v Param Cumaraswamy* at p 517 col 2F–G.)

It follows that the position of the press under our Constitution is not as free as the position of the press under the Indian Constitution and more so when compared to the position of the press in England or the United States of America. This, of course, means that the Indian cases and the Privy Council case of Leonard Hector v A-G of Antigua and Barbuda & Ors relied on by counsel for the accused, are of little relevance and need not be discussed. In saying so we are fortified by what Thomson CJ said in Government of State of Kelantan v Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj at p 358 col 1J. What he said was this:

> *… the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.*

Instances of the application of this approach when interpreting our Federal Constitution are to be found in Loh Kooi Choon v Government of Malaysia at p 189 col 1A and Public Prosecutor v Ooi Kee Saik & Ors at p 113 col 2B-C. Indeed the same point was recognized and applied by the Privy Council (per Lord Radcliffe) in Adegbenro v Akintola at p 73. (Emphasis added.)

Until our Federal Court overrules *Pung Chen Choon*, as a matter of *stare decisis*, all courts in this country are bound by *Pung Chen Choon*. Regrettably in this case, learned counsel for both the appellants and Respondents did not refer the learned HC judge to *Pung Chen Choon*.

K. WHETHER S 4(4) OF THE HRCMA AND UDHR CAN APPLY IN THIS CASE

[58] Sub-section 4(4) of the HRCMA provides as follows:

For the purpose of [HRCMA], regard shall be had to [UDHR] to the extent that it is not inconsistent with [FC]. (Emphasis added.)

[59] The learned HC judge had relied on s 4(4) of the HRCMA to apply UDHR in this case. The majority coram is of the view that the learned HC judge had committed an error of law by applying s 4(4) of the HRCMA to justify the invocation of UDHR in this case (fourth appealable error). The reasons for this decision are as follows:

(1) s 4(4) of the HRCMA only allows 'regard' or consideration of UDHR for the purpose of HRCMA to the extent that such a consideration of UDHR is not inconsistent with the FC. Section 4(4) of the HRCMA has not provided for UDHR to be legally binding per se in this country. UDHR is only enforceable in this country if Parliament has expressly provided in an Act of Parliament that UDHR is legally binding. The

majority coram refers to the HC's judgment in *Kraft Foods Schweiz Holding GmbH v Pendaftar Cap Dagangan* [2016] 11 MLJ 702, at paras [23] and [24], as follows:

> [23] *Malaysia is a signatory to the TRIPS Agreement on 1 January 1995. The following cases have decided that even if Malaysia is bound by a treaty in public international law, such a treaty is only enforceable in Malaysian municipal law if our Parliament has passed legislation to give effect to such a treaty*:
>
> (1) *in the Federal Court case of Bato Bagi & Ors v Kerajaan Negeri Sarawak & another appeal* [2011] 6 MLJ 297, at para 180, *Raus Sharif FCJ (as he then was), decided as follows*:
>
> > [180] *On the issue whether this court should use 'international norms' embodied in the UNDRIP to interpret arts 5 and 13 of the Federal Constitution I have only this to say. International treaties do not form part of our law, unless those provisions have been incorporated into our law*. (Emphasis added.)
>
> (2) in *Air Asia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318, at paras 30, 35 and 37–41, *Zawawi Salleh JCA held in the Court of Appeal as follows*:
>
> > [30] *Before proceeding to discuss the issue, we would like to advert to some general discussions about CEDAW. CEDAW was adopted by the General Assembly of the United Nations in 1979 and came into force in 1981. It is a landmark international agreement that affirms principles of human rights and equality for women around the world. As of April 2014, 188 states have ratified or acceded to treaty …*
> >
> > [35] *Malaysia is a signatory to CEDAW and ratified it in 1995 …*
> >
> > [37] *In our considered opinion, CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation*.
> >
> > [38] *In theoretical terms, the application of international legal systems is often explained in terms of the doctrines of incorporation (or monism) and transformation (or dualism)*.
> >
> > [39] According to the doctrine of incorporation, international law is simply two components of single body of knowledge called law. Law is seen as a single entity of which international and municipal versions are merely particular manifestation. A judge can declare a municipal law invalid if it contradicts an international law because, in some states, the latter is said to prevail.
> >
> > [40] *The doctrine of transformation, on the other hand, holds that the two systems of law, international law and municipal law, are completely separate. A rule of international law can only become part of municipal law if and when it is transformed into municipal law by the passing of local legislation* (see Dinah Shelton (Ed), *International Law in Domestic Legal System: Incorporation, Transformation and Persuasion* (Oxford University Press,

2011); Brownlie, I, *Principles of International Law* (3rd Ed, London, 1996, Chap 4). A

[41] *The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the executive possesses the treaty-making capacity while the power to give effect domestically rests with parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by parliament*. (Emphasis added.) B

(3) *the judgment of Shankar J (as he then was) in the High Court case of Public Prosecutor v Narongne Sookpavit & Ors* [1987] 2 MLJ 100, at 105:

As to this, Article 76(1) of the Malaysian Constitution provides the Federal Parliament with the competence to enact legislation for the purpose of implementing treaties, agreements or conventions between the Federation and any other country or any decision of any international organisation of which the Federation is a member. So before a Convention can come into force in Malaysia, Parliament must enact a law to that effect. The Carriage by Air Act is one such example and the importation of the Geneva Convention on the Territorial Sea and the Contiguous Zone (1958) by the Emergency (Essential Powers) Ordinance No 7 of 1969 is another. *No Malaysian statute has been cited to me to show that art 14 had become part of Malaysian Law. In fact the Ordinance just cited stops at art 13 and the irresistible inference must be that art 14 was not intended to be imported into this country.* (Emphasis added.) C D E

[24] *Based on the above cases, I cannot refer to the TRIPS Agreement unless it can be shown that the TRIPS Agreement has been legislated by our Parliament as part of our municipal law. An example of the transformation of the Paris Convention for the Protection of Industrial Property of 20 March 1883 and revised at Stockholm on 14 July 1967 (Paris Convention) and TRIPS Agreement into our Malaysian law is in s 14(2) of the TMA (which provides that Article 6bis of the Paris Convention and Article 16 of the TRIPS Agreement shall apply for the purpose of determining whether a trade mark is a well-known trademark or otherwise).* (Emphasis added.) F G

HRCMA, including its s 4(4), does not provide that the exercise of the Minister's discretionary power under s 7(1) of the PPPA is subject to UDHR; and

the above decision is supported by the Court of Appeal's judgment in *Sepakat Efektif*, at para [57], as follows: H

[57] *As regards the issue of international law standards being applicable, and the legitimate expectations of the appellants in this regard, the findings of the learned judge are correct. Section 4 HRCMA merely requires our courts to have regard to (UDHR) in the process of interpretation and in the absence of clear constitutional provisions in (FC). The facts of these appeals require the court to have regard to express constitutional provisions in the form of arts 10, 8 and 5. There is no compelling need to directly apply international law rules to supplement our domestic provisions.* (Emphasis added.) I

L. SHOULD COURT CONSIDER MATTERS OTHER THAN GENERAL MESSAGE/IMPRESSION (BOOK)?

[60] The three grounds (ban) concerned the existence of the likelihood to prejudice morality/public order/public interest. As explained in *Mohd Faizal*, the three grounds (ban) did not concern actual prejudice to morality, public order and public interest. Accordingly, the majority coram is of the view that the following considerations are not relevant for the court to decide on the existence or non-existence of the likelihood to prejudice morality/public order/public interest:

(1) the fact that for a period of more than seven years (from September 2013 (publication of the book) until 17 November 2020 (the date of the *gazette* notification (ban)), there was no untoward incident which had arisen from the book's publication/sale/circulation/possession;

(2) there was no evidence regarding how many copies of the book had been published, sold, circulated and possessed by Malaysians;

(3) the appellants did not adduce any view and/or response from different religious and cultural groups of our society regarding the book; and

(4) Dr Wan's expert opinion; and

(5) the appellants did not adduce any expert's view to rebut Dr Wan's expert opinion.

[61] As the learned HC judge had taken into account irrelevant matters as explained in the above sub-paras 36(1)–(5) in Her Ladyship's exercise of discretion to allow the judicial review application (fifth appealable error), the fifth appealable error is a ground for appellate intervention in this case.

[62] Even if it is assumed that the considerations stated in the above sub-paras 36(1)–(5) are relevant in this case, the majority coram has no hesitation to decide that such considerations do not disabuse a reasonable Minister in the position of the first appellant from being satisfied that the general message/impression (book) has the potential to cause the likelihood to prejudice morality/public order/public interest. In other words, notwithstanding the fact that the first appellant did not consider the matters stated in the above sub-paras 36(1)–(5), a reasonable Minister in the position of the first appellant would still be satisfied that the general message/impression (book) has the potential to cause the likelihood to prejudice morality/public order/public interest.

M. WHETHER MINISTER IS REQUIRED BY ARTS 5(1) AND 8(1) OF THE FC TO GIVE A RIGHT OF HEARING BEFORE MAKING THE MINISTER'S DECISION

[63] The majority coram will now consider the question of whether the Minister is required by arts 5(1) and 8(1) of the FC to give a right of hearing to any person who:

(1) is 'interested' in a publication; and

(2) has a legitimate expectation in respect of the publication, ('interested parties (publication)'), before the Minister's decision is made under s 7(1) of the PPPA.

[64] Section 13B of the PPPA states as follows:

> *A person who has been granted a licence or permit under this Act shall be given an opportunity to be heard before a decision to revoke or suspend such licence or permit is made under subsection 3(3), 6(2) or 13(1), as the case may be.* (Emphasis added.)

[65] According to Encik Ahmad Hanir bin Hambaly, the learned senior federal counsel who represents the appellants in this appeal, a comparison between between s 7(1) of the PPPA on the one part and ss 7(3) and 13B of the PPPA on the other part, shows the intention of Parliament to exclude a right of hearing before the Minister exercises his discretion to ban a publication under s 7(1) of the PPPA.

[66] The majority coram is of the following view:

(1) if the Legislature has provided for an exercise of executive discretion in a statute ('statute'), the Legislature has the prerogative to exclude a right of hearing in the statute before the executive decision is made. Unless Parliament has excluded a right of hearing in the Statute, either expressly or by necessary implication in the statute, a right of hearing is implied by our case law. This is clear from the following judgment of Raja Azlan Shah FJ (as his Majesty then was) in the Federal Court case of *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152, at p 154:

> *In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing.* (Emphasis added.)

(2) an example of Parliament's exclusion of the right of hearing in a statute is demonstrated in the judgment of the Federal Court delivered by Siti Norma Yaacob FCJ (as she then was) in *Nordin Hj Zakaria (Timbalan*

Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] MLJU 760; [2004] 2 CLJ 777 at p 784, as follows:

> *Reading the provisions of (Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970) in its entirety, I see no requirement that entitles the respondent to be informed of the possibility of him being dismissed or reduced in rank in the event he is convicted of any of the charges preferred against him in either the show cause letter or prior to the start of the disciplinary enquiry. There is no provision imposing a similar obligation as that prescribed by reg 28(1) of the 1993 Regulations. Since the 1970 Regulations impose no duty on the first appellant to inform the respondent at the first opportunity of the likelihood of his dismissal or reduction in rank, the first appellant cannot be said to have deprived the respondent of any procedural fairness as there cannot be any breach of duty where none exists in law.* (Emphasis added.)

(3) as correctly submitted by Encik Ahmad Hanir, a comparison between s 7(1) of the PPPA (which does not provide for a right of hearing on interested parties (publication)) on the one hand and ss 7(3) and 13B of the PPPA (which have expressly conferred a right of hearing on interested parties (publication)] on the other hand, reveals the intention of the Legislature to exclude a right of hearing for interested parties (publication) before the Minister makes a decision pursuant to s 7(1) of the PPPA (Parliament's Exclusion of Right of Hearing (s 7(1) of the PPPA)).

[67] The majority coram has not overlooked the following judgment of Abu Bakar Jais JCA (as he then was) in *Islamic Renaissance Front* [2020] 5 MLJ 399, at paras [27]–[29], [31], [38]–[39], [44]–[46], [49]–[50] and [61]:

> [27] ... *After evaluating the issues raised, we would say there are only two important points, which we will focus and highlight that would be sufficient to effectively determine this appeal to its conclusion*.
>
> [28] *First is the undeniable fact that both the High Court and the respondent chose to avoid the issue that the respondent failed to comply with the order of discovery made by the High Court itself* ...
>
> [29] *It is undisputed that because of the order of discovery, the appellant is entitled to the Jakim's reports and the recommendations and comments of the Publication and Quranic Text Control Division. There is also no dispute that part of the Jakim's reports and the recommendations and comments of the Publication and Quranic Text Control Division were never provided to the appellant. And it cannot be disputed these are crucially relevant documents because the respondent had relied on the same to issue the orders affecting the publications* ...
>
> ...
>
> [31] *Bearing in mind the above quotation, we are of the opinion that the respondent's exercise of discretion cannot be real. This is because the respondent failed to show the recommendations and comments of the Publication and Quranic Text Control Division,*

not to mention part of the reports by Jakim. As indicated these comments and recommendations were taken into account by the respondent before the orders were issued. And it cannot be over-emphasised the High Court allowed the discovery of these comments and recommendations for the appellant. Yet as pointed out, these were not provided to the appellant by the respondent. The failure to show these begs the question whether it is true in the first place that the same were taken into account by the respondent before issuing the orders. It also begs the question whether the same is even material to be considered. Even more serious is the suspicion that these documents do not exist at all. The sum effect of this amounts to serious doubt whether there was a real exercise of discretion by the respondent as required by Lie Seng Fatt and Wednesbury Corp.

...

[38] *We are of the view that this issue regarding the non-production of the documents alone merits the appeal to be allowed, no less by the fact this is a serious issue which was not addressed at all by the High Court and the respondent*.

[39] *Nonetheless, we could also allude to another important point of contention that is material in conclusively disposing the appeal, without the need to address all the issues raised. This relates to the submission regarding the right to be heard before the respondent's orders were issued. As indicated, there is also no dispute this right was not accorded to the appellant*.

...

[44] *There is no such provision in [PPPA]. Therefore in coming to its decision, the Federal Court was confining itself to the statutory provision as narrated above. The Federal Court then did not at all make a ruling of general application that there is no right of hearing when that right is not stated as a procedural requirement. In fact without such statutory constraint as seen in Lee Kew Sang, a right of hearing is a basic and fundamental right that should be accorded (see Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261).

[45] *Further, the right of hearing is always available and enshrined without requiring it to be stated in any statutory provisions. The Federal Court was clear on this principle in Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 ...

...

[46] *As indicated there is no dispute that the respondent did not give any right of hearing to the appellant before issuing the orders. This right should have been given following the decision above. Therefore, with respect the High Court erred in following Lee Kew Sang and not following Ho Kwan Seng*.

...

[49] *Following the above, what should have been done by the respondent is to give the right of hearing to the appellant. After this is provided and the respondent considers what is said by the appellant, only then would the requirements of natural justice be fulfilled*.

[50] *Also relevant to note is the fact (PPPA) itself does not say that a right of hearing should be excluded. The right of hearing can be excluded as seen in s 59 of the Immigration Act 1959/63 post JP Berthelsen. But since this was not the case for the Act,*

the appellant must be given the right of hearing.

...

[61] *Based on all the reasons aforesaid, with respect, the learned High Court judge erred on two instances. One, in respect of the need for the respondent to show the relevant documents and also in respect of the need to give the right of hearing to the appellant* ... (Emphasis added.)

[68] With respect, the majority coram is of the following opinion regarding *Islamic Renaissance Front*:

(1) in *Islamic Renaissance Front*, the Minister did not comply with a prior discovery order of the High Court. On this ground alone, the Minister's decision under s 7(1) of the PPPA should be quashed; and

(2) learned counsel in *Islamic Renaissance Front* did not draw the court's attention to Parliament's Exclusion of Right of Hearing (s 7(1) of the PPPA).

[69] In view of Parliament's Exclusion of Right of Hearing (s 7(1) of the PPPA) (please refer to the above para 66), the learned HC judge had erred in deciding that the respondents had a constitutional right to be heard before the ban was issued by the first appellant (sixth appealable error).

N. DID MINISTER GIVE REASON FOR BAN?

[70] The *gazette* notification (ban) had expressly provided for the three grounds (ban). Furthermore, MHA's letter dated 30 December 2020 to the first respondent had given the first appellant's reasons for the ban. Accordingly, the learned HCJ had committed a plain error of fact by deciding that the first appellant did not provide any reason for the ban (seventh appealable rrror).

O. MAJORITY DECISION

[71] The majority coram is unable to find that:

(1) the first appellant had committed any error of law regarding the ban;

(2) there was procedural impropriety committed in respect of the first appellant's issuance of the ban (there is no right to be heard under s 7(1) of the PPPA — please refer to the above para 66);

(3) the ban was irrational in the sense that no reasonable Minister would have issued the ban; and

(4) the ban was so disproportionate that the court should issue a certiorari order to quash the ban.

[72] In view of the first to seventh appealable errors, the majority coram is constrained to:

(1) allow this appeal; and

(2) set aside the HC's decision; and

(3) order the respondents to pay to the appellants costs in a sum of RM15,000 here and below.

Appeal allowed by majority and HC's decision set aside.

Reported by Ashok Kumar